No. 94-167

In the Supreme Court of the United States

OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, ET AL.,
PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

2. Whether Section 709 of the Controlled Substances Act, 21 U.S.C. 904, which authorizes the Attorney General to pay tort claims arising from operations of the Drug Enforcement Administration abroad, gives petitioner a right of action for damages against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-7b) is unpublished, but the decision is noted at 23 F.3d 402 (Table). The order of the district court (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1994. The petition for a writ of certiorari was filed on July 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The principal question presented in this case is whether the Attorney General's certification that a federal employee was acting within the scope of employment is conclusive for purposes of substitution of the United States as the defendant in a pending tort action. In its decision below, the court of appeals followed its prior decision in *Johnson* v. *Carter*, 983 F.2d 1316, 1319-1321 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993), and concluded that the Attorney General's certification is conclusive and not subject to judicial review.

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Westfall Act provides immunity to government employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant. The suit then proceeds against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

The Westfall Act accomplishes this result through statutory language that states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).[1] The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). The Attorney General has delegated the authority to certify that an employee was acting within the scope of the employee's office or employment to the United States Attorneys, who make scope certification deter-

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[1] Subsection (d) also authorizes the United States to remove actions from state court:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d)(2).

minations in consultation with the Department of Justice. See 28 C.F.R. 15.3.

2. Petitioners are citizens of the Republic of Colombia. They allege that on January 18, 1991, respondent Dirk A. Lamagno, a Special Agent employed by the Drug Enforcement Administration (DEA), caused an automobile accident in Barranquilla, Colombia. Lamagno was the driver of a government-owned Ford Bronco that collided with the car in which petitioners were occupants. Petitioners seek general and specific damages for physical injuries and property damage. Pet. App. 2b. See Pet. 5-9.

On May 8, 1991, petitioners filed an administrative claim with the DEA pursuant to Section 709 of the Controlled Substances Act, as amended, which states:

> Notwithstanding section 2680(k) of title 28,[2] the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of title 28,[3] when such claims arise in a foreign country in connection with the operations of the Drug Enforcement Administration abroad.

21 U.S.C. 904 (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048). The Drug Enforcement Administration lacked authority

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[2] Section 2680(k) excepts "[a]ny claim arising in a foreign country" from the FTCA and Title 28's provisions governing tort claim procedure.

[3] Section 2672 deals with administrative adjustment of claims.

to resolve a claim in the dollar amount that petitioners requested, and it referred the claim to the Department of Justice. The Department has not made a final administrative decision on that claim. Pet. App. 2b-3b.

On January 15, 1993, petitioners filed this action in the United States District Court for the Eastern District of Virginia based on diversity of citizenship. The United States Attorney certified on behalf of the Attorney General that respondent Lamagno was acting within the scope of his office or employment under the Westfall Act and moved to substitute the United States as the defendant. See 28 U.S.C. 2679(d)(1). The district court substituted the United States in place of Lamagno and dismissed him from the action. The United States then moved to dismiss the suit on the ground that the United States has retained its immunity for suits based on "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The district court granted the motion and dismissed the action. Pet. App. 1a, 3b.

The court of appeals affirmed the order of the district court that substituted the United States as defendant in place of Lamagno. Pet. App. 1b-7b. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. 6b-7b. See *Johnson* v. *Carter*, 983 F.2d 1316, 1319-1321 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993). It also concluded that Section 709 of the Controlled Substances Act, 21 U.S.C. 904, did not provide a basis for petitioners' suit, because that

provision is not a waiver of sovereign immunity and because it does not provide for judicial review of the Attorney General's actions on tort claims arising in a foreign country. Pet. App. 4b-5b. The court of appeals further rejected petitioners' argument that their claim is based on "headquarters" negligence originating in the District of Columbia and therefore is not barred by 28 U.S.C. 2680(k). Pet. App. 5b-6b.

DISCUSSION

Petitioners challenge the court of appeals' determination that respondent Lamagno was acting within the scope of his employment for purposes of the Westfall Act at the time of the auto accident from which their claims arise. Petitioners specifically take issue with the court of appeals' ruling that the Attorney General's scope-of-employment certification is conclusive under the Westfall Act. Pet. 12-30. We believe that the court of appeals' ruling on this question was incorrect, and we agree that this issue warrants review by this Court.

1. The Westfall Act does not expressly provide for judicial review of the Attorney General's certification decisions. Immediately after enactment of the Westfall Act, the United States took the position that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The United States subsequently reconsidered its position, however, and concluded that a certification decision made under 28 U.S.C. 2679(d)(1) is judicially reviewable. See U.S. Br. in Opp. in *Lehtinen* v. *S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); U.S. Br. in Opp. in *Johnson* v. *Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-

1591). Despite the United States' position, the Fourth Circuit has held that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. See *Johnson* v. *Carter*, 983 F.2d 1316, 1319-1321 (en banc), cert. denied, 114 S. Ct. 57 (1993).

The Fourth Circuit's ruling that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review decides a significant question of federal law on which there is a square conflict among the courts of appeals. The Fourth Circuit's holding finds support in the decisions of two courts of appeals that have suggested, in cases in which the Attorney General's certification was not challenged, that the certification decision must be given conclusive effect.[4] Seven other courts of appeals, however, have reached a contrary result and have allowed judicial review of the certification decision.[5] Because the Fourth

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[4] See *Mitchell* v. *Carlson*, 896 F.2d 128, 136 (5th Cir. 1990); *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989). On September 12, 1994, the Fifth Circuit heard argument en banc in *Garcia* v. *United States*, No. 92-8490, which presents the question whether the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The question is also presented in a petition for certiorari filed from another Fifth Circuit decision that is currently pending before this Court. See *King Fisher Marine Serv., Inc.* v. *Perez*, No. 94-48. We are filing a response to that petition simultaneously with this brief.

[5] See *Schrob* v. *Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown* v. *Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick* v. *Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. &*

Circuit's position was established in an en banc decision, *Johnson* v. *Carter*, *supra*, the conflict is likely to persist. Accordingly, the Court should grant the petition to review whether the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review for the purpose of the substitution of the United States as defendant.[6]

2. The other question raised in the petition, whether petitioners are entitled to judicial review under Section 709 of the Controlled Substances Act, does not warrant further consideration by this Court. By its plain language, Section 709 simply grants the Attorney General discretion to pay tort claims when such claims arise from DEA activities in foreign countries. See 21 U.S.C. 904. Section 709 does not waive the United States' sovereign immunity or allow for judicial review of the Attorney General's decision to pay or not pay a claim. This Court has repeatedly refused to infer that Congress has waived the United

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W. Ranch, Inc. v. *Lehtinen*, 913 F.2d 1538, 1543, modified, 924 F.2d 1555 (11th Cir. 1990), cert. denied, 112 S. Ct. 62 (1991); *Nasuti* v. *Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

[6] The Justice Department has represented Mr. Lamagno in the proceedings below. We have notified him that the United States will take a position in this litigation that is potentially contrary to his personal interests and that he may wish to retain private counsel to represent his interests before this Court. In the event that Mr. Lamagno does not enter an appearance through retained counsel, this Court may wish to appoint counsel to defend the Fourth Circuit's decision and to ensure that this Court has the benefit of an adversarial presentation. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968).

States' sovereign immunity through statutory language that does not "unequivocally" express that intent. *E.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976). There is no conflict among the courts of appeals on this question, and the decision of the court of appeals below does not conflict with any decision of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted limited to question one.

Respectfully submitted.

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